

APPEAL NO. 041672  
FILED AUGUST 18, 2004

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on June 23, 2004. The hearing officer determined that the appellant/cross-respondent (claimant) is not otherwise eligible but the claimant is entitled to supplemental income benefits (SIBs) for the fourth quarter, as the respondent/cross-appellant (carrier) waived its right to contest entitlement by failing to timely request a benefit review conference (BRC); that the claimant is not entitled to SIBs for the fifth quarter; and that the carrier did not waive the right to contest the claimant's entitlement to SIBs for the fifth quarter by failing to timely request a BRC. The claimant appealed the hearing officer's determination that he is not entitled to SIBs for the fifth quarter, asserting that he had a total inability to work during the relevant qualifying period and no other record showed that he had some ability to work in any capacity. The carrier appealed the hearing officer's determination that the claimant is entitled to SIBs for the fourth quarter, asserting that the claimant is not entitled to SIBs for the fourth quarter, but is to be paid SIBs for the fourth quarter because of the carrier's failure to timely request a BRC. Both parties responded to the other party's appeal.

DECISION

Affirmed.

As to the claimant's appeal, the hearing officer did not err in determining that the claimant is not entitled to SIBs for the fifth quarter. The hearing officer determined that the evidence presented revealed that the claimant possessed an ability to work during the qualifying periods in dispute and that he did not conduct weekly job searches as required by Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d)(5) (Rule 130.102(d)(5)). The hearing officer was not persuaded that the totality of the evidence presented was sufficient to satisfy the requirements of Rule 130.102(d)(4). Specifically, the hearing officer essentially determined that there was a narrative report from the claimant's doctor that specifically explained how the claimant's injury caused a total inability to work, but that "other records" showed that the claimant had some ability to work during the relevant qualifying periods. Nothing in our review of the record reveals that the hearing officer's determinations in that regard are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. As such, no sound basis exists for us to disturb the hearing officer's good faith determination, or the determination that the claimant is not entitled to SIBs for the fifth quarter, on appeal. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

The carrier appealed, requesting that we render a decision that the claimant is not entitled to SIBs for the fourth quarter, but that the carrier is liable for payment of SIBs for the fourth quarter. We cannot agree with the argument presented by the carrier in support of its position in this regard. Section 408.147(b) provides, in pertinent

part, "if an insurance carrier fails to make a request for a [BRC]...within 10 days after receipt of the employee's [Application for SIBs (TWCC-52)], the insurance carrier waives the right to contest entitlement to [SIBs] and the amount of [SIBs] for that period...." See *also* Rule 130.108(d), regarding subsequent quarters with prior payment. It is undisputed that the carrier paid SIBs for the prior quarter. Additionally, the parties stipulated that the carrier received the claimant's application for fourth quarter SIBs on January 6, 2004, and did not dispute entitlement by requesting a BRC. Accordingly, the hearing officer properly concluded that the carrier waived its right to contest the claimant's entitlement to fourth quarter SIBs. Because the carrier has waived the right to contest the claimant's entitlement to fourth quarter SIBs, the claimant is entitled to SIBs for the fourth quarter.

The hearing officer's decision and order are affirmed.

The true corporate name of the insurance carrier is **TEXAS MUTUAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**MR. RUSSELL R. OLIVER, PRESIDENT  
221 WEST 6TH STREET  
AUSTIN, TEXAS 78701.**

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Daniel R. Barry  
Appeals Judge

CONCUR:

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Elaine M. Chaney  
Appeals Judge

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Edward Vilano  
Appeals Judge